Chin Choon @ Chin Tee Fut v Chua Jui Meng

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–372 OF 2000
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND NIK HASHIM JJCA
14 OCTOBER 2004

Tort — Defamation — Damages — Compensatory damages — Aggravated damages — Exemplary damages — Whether aggravated and exemplary damages should be made — Whether separate awards for aggravated and exemplary damages should be made — Whether of award of damages manifestly excessive

The appellant is an advocate and solicitor. At the date of publication of the admitted libel, the respondent was the deputy minister for International Trade and Industry. The appellant made a charge against the respondent that was of the gravest nature. He alleged that the respondent had acted corruptly in the discharge of his duties. This charge was made at a press conference called at the appellant's behest. The story was carried by two newspapers of the Chinese vernacular. Later, the appellant repeated the defamatory words to a very limited audience outside the office of the Anti Corruption Agency where he had gone to lodge a report. He said that he had 'boxes of evidence' against the respondent. As it turned out, there was no such evidence. This was the appellant's appeal against the award of damages made against him in respect of the libel admittedly committed by him upon the respondent. The trial judge awarded a total sum of RM1,500,000 made up of RM500,000 as compensatory damages, RM500,000 as aggravated damages and a further RM500,000 as exemplary damages. The appellant complained that these awards were excessive.

Held, allowing the appeal:

(1) Aggravated damages should be awarded based on the appellant's conduct. In this case, we have an arrogant appellant who had not only put a plea of justification on record but said that he had 'boxes of evidence' against the respondent. The boxes, as it transpired were empty and the plea of justification was withdrawn. The court was therefore unable to accept the submission that the respondent should receive only nominal damages. That submission itself which suggested that the respondent was of poor character meriting to receive only nominal damages constituted an aggravating factor. In a defamation action, the way in which a defendant conducts the trial or an appeal may be grounds for awarding aggravated damages (see para 10).

(2) Any form of advantage gained by a defendant in a defamation case suffices. It need not produce an immediate profit in money terms. It may produce an immediate non-pecuniary advantage that may translate itself into a monetary reward sometime later. In this case, the appellant by his tortuous conduct wanted to impress members of the Chinese community

that he was an advocate who feared no one, not even a deputy minister of the government when it came to advancing his client's cause. Reasonable persons who read his statement may well decide to retain his services because of the impression created by him. So, he stood to gain from what he did. This is accordingly a suitable case to make an award of exemplary damages (see para 12); *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551 followed.

(3) Separate awards for aggravated and exemplary damages should not be made in a defamation case. It was never the practice to award interest on each separate head of damages (aggravated and exemplary damages). Interest was merely granted on the single award. In defamation cases, the court should maintain the age old practice of making a global award in order to limit the size of awards. Otherwise there will be runaway damages once again (see para 13); *Cassell v Broome* [1972] AC 1027 followed.

(4) The court having considered and taken into account all the factors operating in the respondent's favour were of the view that the award of RM1,500,000 was manifestly excessive. It was certainly far in excess of the range of awards in defamation cases. Having regard to the very special circumstances of this case, an award of RM200,000 was a fair sum by way of a global award of damages. The award included compensatory, aggravated and exemplary damages (see para 14); *Karpal Singh v DP Vijandran* [2001] 4 MLJ 161; *Dato Musa bin Hitam v SH Alatas & Ors* [1991] 1 CLJ 314 distinguished.

[**Bahasa Malaysia summary**

Perayu merupakan seorang peguambela dan peguamcara. Semasa tarikh penerbitan libel yang dikatakan, responden merupakan timbalan menteri Perdagangan Antarabangsa dan Industri. Perayu membuat penuduhan terhadap responden yang menjejaskan sifatnya. Beliau mengatakan bahawa responden telah bertindak secara tidak amanah dalam melaksanakan tanggungjawabnya. Penuduhan ini dibuat semasa sidang akhbar yang dipanggil atas permintaan perayu. Cerita ini disiarkan oleh dua akhbar bahasa Cina. Kemudian, perayu mengulangi perkataan-perkataan berunsur fitnah tersebut kepada beberapa orang di luar pejabat Agensi Pencegah Rasuah di mana beliau membuat aduan. Beliau berkata bahawa beliau mempunyai 'boxes of evidence' terhadap responden. Namun sebaliknya, tiada bukti sedemikian. Ini merupakan rayuan perayu terhadap award ganti rugi yang dibuat terhadapnya berkaitan libel yang dikatakan dilakukan oleh beliau terhadap responden. Hakim perbicaraan telah mengawardkan jumlah keseluruhan RM1,500,000 yang membentuk RM500,000 sebagai ganti rugi pampasan, RM500,000 sebagai ganti rugi melampau dan selebihnya RM500,000 sebagai ganti rugi teladan. Perayu mengadu bahawa award-award berikut adalah keterlaluan.

Diputuskan, membenarkan rayuan tersebut:

(1) Ganti rugi melampau hendaklah diawardkan berdasarkan perbuatan perayu. Dalam kes ini, perayu bukan sahaja membuat pli justifikasi atas rekod tetapi mengatakan beliau mempunyai 'boxes of evidence' terhadap responden. Kotak-kotak tersebut, rupa-rupanya kosong dan pli justifikasi ditarik balik. Mahkamah oleh itu tidak dapat menerima hujah bahawa responden patut menerima ganti rugi yang nominal sahaja. Hujah itu sendirinya mencadangkan bahawa responden tidak mempunyai sifat baik yang memeritkan diri untuk menerima ganti rugi yang nominal sahaja yang membentuk faktor yang melampau. Dalam satu tindakan fitnah, cara bagaimana defendan mengendalikan perbicaraan atau rayuan boleh menjadi alasan untuk mengawardkan ganti rugi melampau (lihat perenggan 10).

(2) Apa-apa bentuk kelebihan yang diperoleh oleh defendan dalam kes fitnah adalah mencukupi. Tidak ada keperluan untuk mengemukakan keuntungan segera dalam bentuk wang. Ia mungkin akan mengemukakan kelebihan segera yang tidak berunsur wang yang mungkin boleh membentuk satu ganjaran berbentuk wang kemudiannya. Dalam kes ini, perayu melalui perbuatan tort beliau hendak menunjukkan kepada golongan Cina bahawa beliau seorang peguam yang tidak takut kepada sesiapa, walaupun timbalan menteri kerajaan sekalipun dalam mengendalikan kes anakguamnya. Sesiapa yang waras membaca kenyataan beliau akan mengekalkan khidmatnya kerana reputasi beliau yang sedemikian. Oleh itu, beliau mempunyai kelebihan daripada apa yang beliau lakukan. Ini adalah satu kes yang sesuai untuk membuat satu award untuk ganti rugi teladan (lihat perenggan 12); *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551 diikut.

(3) Award-award berasingan untuk ganti rugi melampau dan teladan tidak patut dibuat dalam kes fitnah. Bukan satu amalan untuk mengawardkan faedah ke atas setiap kepala ganti rugi yang berasingan (ganti rugi melampau dan teladan). Faedah hanya dibenarkan dalam satu award. Dalam kes-kes fitnah, mahkamah hendaklah mengekalkan amalan lama membuat award secara global bagi tujuan menghadkan bilangan award. Jika tidak, ganti rugi runaway akan berlaku (lihat perenggan 13); *Cassell v Broome* [1972] AC 1027 diikut.

(4) Setelah mahkamah mengambilkira dan menimbangkan semua factor yang berpihak kepada responden ia berpendapat award RM1,500,000 adalah keterlaluan. Ia melampaui batas award-award untuk kes fitnah. Berdasarkan keadaan tertentu kes ini, award RM200,000 adalah jumlah yang adil mengikut award ganti rugi secara menyeluruh. Award tersebut termasuklah ganti rugi-ganti rugi pampasan, malampau dan teladan (lihat perenggan 14); *Karpal Singh v DP Vijandran*[2001] 4 MLJ 161; *Dato Musa bin Hitam v SH Alatas & Ors* [1991] 1 CLJ 314 dibeza.]

Notes

For cases on damages for defamation, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 254–264.

Cases referred to

Cassell v Broome [1972] AC 1027 (folld)
Chong Siew Chiang v Chua Ching Geh & Anor [1995] 1 MLJ 551 (folld)
Dato Musa bin Hitam v SH Alatas & Ors [1991] 1 CLJ 314 (distd)
Karpal Singh v DP Vijandran [2001] 4 MLJ 161 (distd)
Liew Yew Tian v Cheah Cheng Hoc [2001] 2 CLJ 385 (refd)
Rookes v Barnard [1964] AC 1129 (refd)

Appeal from: Civil Suit No S2–22–503 of 1994 (High Court, Kuala Lumpur)

Mohamed Zaini Mazlan (CL Chin & Associates) for the appellant.
Darryl SC Goon (Yvonne Ong with him) (Raja, Darryl & Loh) for the respondent.

Gopal Sri Ram (delivering judgment of the court):

[1] The appellant is an advocate and solicitor. He was the second defendant in the court below. This is his appeal against the award of damages made against him in respect of the libel admittedly committed by him upon the respondent. The trial judge awarded a total sum of RM1,500,000 made up of RM500,000 as compensatory damages, RM500,000 as aggravated damages and a further RM500,000 as exemplary damages. The appellant complains that these awards are excessive.

[2] At the date of publication of the admitted libel, the respondent was the deputy minister for International Trade and Industry. The appellant made a charge against the respondent that was of the gravest nature. He alleged that the respondent had acted corruptly in the discharge of his duties. This charge was made at a press conference called at the appellant's behest. The story was carried by two newspapers of the Chinese vernacular. Later, the appellant repeated the defamatory words to a very limited audience — three or four journalists — outside the office of the Anti Corruption Agency where he had gone to lodge a report. He said that he had 'boxes of evidence' against the respondent. As it turned out, there was no such evidence. Further, the appellant who had taken the plea of justification abandoned it in the course of the trial. We would add that there is evidence to show that the appellant was acting for a client who was facing a possible charge of extortion and had embarked upon his chosen course of action against the respondent for the purpose of demonstrating to the world at large that he was a fearless advocate who was prepared to take on anyone irrespective of his standing.

[3] When this appeal was called on for argument this Monday past, 11 October 2004, this court formed the view that the quantum of damages under all three heads was excessive having regard to the recent trend of awards in defamation cases. Accordingly, counsel for the respondent was called upon to show why the appeal should not be allowed and the damages reduced. Learned counsel for the respondent then drew our attention to the matters set out in para 2 of this judgment as grounds that justified the awards in this case. He also submitted that the evidential materials relied on by the respondent were sufficiently weighty, on the very special facts of this case, to justify the very large awards made by the High Court.

[4] Attention was called to *Liew Yew Tian v Cheah Cheng Hoc* [2001] 2 CLJ 385, where this court held that the width or extent of a publication is always a relevant consideration when assessing compensatory damages. Counsel argued that since in that case damages of RM100,000 were awarded when the publication was only to two persons, the award of RM500,000 was not manifestly excessive here because the publication was to two newspapers, namely, China Press and Shin Min Daily News. According to the evidence, the former has a very large daily circulation while the latter has only a circulation of about 2000 copies per day. On the other hand, counsel for the appellant pointed out that the article in the China Press was not disparaging in any way of the respondent and that only that in the Shin Min was. He then argued that only nominal damages should be awarded.

[5] In *Defamation Law, Procedure & Practice* by Price & Duodu (3rd ed, para 20–04 at p 208) the learned authors set out the several factors that a court must take into account in assessing compensatory damages. This is what they say:

> The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:
>
> (1) The gravity of the allegation.
> (2) The size and influence of the circulation.
> (3) The effect of the publication.
> (4) The extent and nature of the claimant's reputation.
> (5) The behaviour of the defendant.
> (6) The behaviour of the claimant.

This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment.

[6] In *Karpal Singh v DP Vijandran* [2001] 4 MLJ 161, this court reduced an award of RM500,000 to RM100,000 on the ground that the award was out of sync with the latest trend of awards. The plaintiff in that case was also a politician. So was the defendant. Both were lawyers. The conduct of both of them was relevant and was taken into account as follows:

The respondent relied on his position as a public figure in this suit. But the same members of the public who would have read the reports in the two newspapers would also have read in all the newspapers in the country about him and the reasons leading to the resignation of the respondent from the post of deputy speaker and his downfall in politics. It would not be correct to say that the plaintiff's standing, character, credit and reputation as a public figure was at its pinnacle at the time the libel was committed and totally collapsed because of this libel. In any event, he certainly cannot claim to enjoy a higher standing, credit and reputation as a public figure than Dato' Musa bin Hitam who was only awarded RM 100,000 for such a serious libel published just before the UMNO general assembly.

…

Now, coming to the appellant. He is a well known lawyer and politician. He was a member of Parliament and a state assemblyman representing opposition at that time. It is common knowledge that he was responsible for exposing the respondent culminating in the respondent's political downfall. The cheque incident gave him another opportunity to further ruin the respondent. He utilised it to the fullest. The fact that his press statement was typed on his 'Member of Parliament' letterhead with his party symbol and the fact that he signed the press statement as 'Deputy Chairman, DAP, Malaysia' and 'Member of Parliament, Malaysia' shows his political motive. He did not apologize. And he stood his ground throughout. That is the scenario.

In the circumstances, I am of the view that the award made by the learned trial judge is excessive. A total award of RM100,000 would be more reasonable.

[7] *Karpal Singh v DP Vijandran* is readily distinguishable from the present case. The conduct of the plaintiff and the defendant there was fairly similar and more or less cancelled each other out. So the award of RM100,000 was entirely justified. But that is not the case here. In the present instance, the respondent is a man of high reputation and has in no way misconducted himself either before or at the trial. By contrast, the appellant made a monstrous charge against a man whose honesty has never been called into question. As such the award in *Karpal Singh v DP Vijandran* is not a useful comparable.

[8] *Dato Musa bin Hitam v SH Alatas & Ors* [1991] 1 CLJ 314 is also distinguishable on the ground that at the date of the libel the plaintiff in that case no longer held public office as a member of the elected executive. But it is to be observed that in that case Lim Beng Choon J made a single global award of RM100,000 that included both compensatory and aggravated damages.

[9] On the award of aggravated damages learned counsel for the respondent referred us to *Gatley on Libel & Slander* (9th ed, para 32–49 at p 826) which reads:

However, the defendant is not confined to evidence of malice when seeking aggravated damages. Thus the fact that the defendant has pleaded justification, and attempted at the trial to establish the plea by persisting in the charge, can be taken into account by the jury in assessing damages if they find that the plea is not sustained. A fortiori if the defendant does not attempt to establish the plea at the trial but

> does not abandon it. Indeed it has been held that the mere fact that the defendant has placed a plea of justification on the record is a matter the jury can consider when estimating damages, even though the defendant withdraws the plea at trial. It has been doubted whether mere failure to make an apology can ever justify aggravation of damages. But the weight of recent authority is to the effect that the absence of an apology can, depending on the facts of the case, increase injury to feelings.

[10] It was submitted that based on the appellant's conduct aggravated damages should be awarded. We think that there is merit in the respondent's submission. Here we have a case of an arrogant appellant who not only put a plea of justification on record but said that he had 'boxes of evidence' against the respondent to show that the latter had accepted RM500,000 or even RM600,000. The boxes, as it transpired were empty and the plea of justification was withdrawn. We are therefore unable to accept the submission by the appellant that the respondent should receive only nominal damages. That submission contains the suggestion that the respondent is of poor character meriting to receive only nominal damages, in our view, itself constitutes an aggravating factor. It is established that in an action in defamation, the way in which a defendant conducts the trial or an appeal may be grounds for awarding aggravated damages.

[11] Next is the claim for exemplary damages. It is the submission of learned counsel for the appellant that no exemplary damages should be awarded as his client did not profit monetarily from the attack on the respondent. In support of his submission he relies on the well-known passage in the speech of Lord Devlin in *Rookes v Barnar*d [1964] AC 1129 affirmed by the House in *Cassell v Broome* [1972] AC 1027. The learned Law Lord said that there are only two category of cases in which exemplary damages may be awarded. The first is not relevant here. Of the second he said:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

[12] With respect, we do not think it a fair interpretation of Lord Devlin's speech when read as a whole that he intended that grant of punitive or exemplary damages to be limited only to cases of monetary profit. That is too narrow an interpretation. In our judgment, any form of advantage gained by a defendant in a defamation case suffices. It need not produce an immediate profit in money terms as happened in *Dato Musa bin Hitam v SH Alatas & Ors*. It may produce an immediate non-pecuniary advantage that may translate itself into a monetary reward sometime later. Take this very case. The appellant by his tortuous conduct wanted to impress members of the Chinese community that he was an advocate who feared no one, not even a deputy minister of the government when it came to advancing his client's cause. Reasonable persons who read his statement may well decide to retain his services because of the impression created by him. So, he stood to gain from what he did. This is

accordingly a suitable case to make an award of exemplary damages. We agree with the approach adopted by Richard Malanjum J in *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551, where he suggested that the benefit obtained by a defendant who libels a plaintiff may be financial or otherwise.

[13] There is one matter of some importance that this case has raised. It appears to be the respondent's argument that separate awards for aggravated and exemplary damages should be made. That is what the High Court did. With respect, we disagree with this approach. For many years it was thought that in all cases of tort global awards should be made, including in claims for personal injuries. However, only in respect of claims for personal injuries, when the courts started awarding interest at different rates on the different heads of damages, it became necessary for courts to make separate awards for pain and suffering and loss of amenities, actual loss of income, future loss and special damages. But in defamation cases it is never the practice to award interest on each separate head of damages. Interest is merely granted on the single award. In our judgment, we should, in defamation cases, maintain the age old practice of making a global award in order to limit the size of awards. Otherwise we will have runaway damages once again. The speech of Lord Hailsham in *Cassell v Broome* appears to fairly support the view we take of the matter.

[14] We have considered and taken into account all the factors operating in the respondent's favour. Yet, we are of the view that the award of RM1,500,000 is manifestly excessive. It is certainly far in excess of the range of awards in defamation cases. In our judgment, having regard to the very special circumstances of this case, an award of RM200,000 is a fair sum by way of a global award of damages. We are conscious that this award is twice the size of those made in recent cases. But it is made to meet the very special circumstances of this case. The award herein includes in it compensatory, aggravated and exemplary damages.

[15] For the reasons already given, this appeal is allowed. The award of RM1,500,000 made by the High Court is set aside. In its place a sum of RM200,000 is substituted.

[16] Now for the question of costs. This is a case in which liability is not in issue. It is only a quantum question. In our view, the appellant has misconducted himself both at the trial and on the appeal in the manner already explained. He should therefore be deprived of his costs here. We would therefore make no order as to costs in this appeal and direct the deposit to be refunded to the appellant. But we will not disturb the order for costs made by the High Court. Those proceedings were necessitated by the appellant's conduct. He must pay those costs.

Appeal allowed.

Reported by Peter Ling